

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





**ORIGINAL**

**74-2643**

(41910)

**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

MATTIE G. DIXON, as Administratrix of the Estate of  
L. C. SHERMAN, JR.,

*Plaintiff-Appellee,*

*vs.*

80 PINE STREET CORPORATION, RUDIN MANAGEMENT CORP.,  
RAISLER CORP., THE CONSOLIDATED EDISON COMPANY  
OF NEW YORK, ADSCO MANUFACTURING CORP., RUTHER-  
FORD L. STINARD, EMERY ROTH, RICHARD ROTH and  
JULIAN ROTH, d/b/a EMERY ROTH & SONS,

*Defendants-Appellees,*

CITY OF NEW YORK, THE BOARD OF INQUIRY OF THE DE-  
PARTMENT OF BUILDINGS OF THE CITY OF NEW YORK,  
and LOUIS BECK,

*Appellants.*

**On Appeal from the United States District Court**  
**For the Southern District of New York**

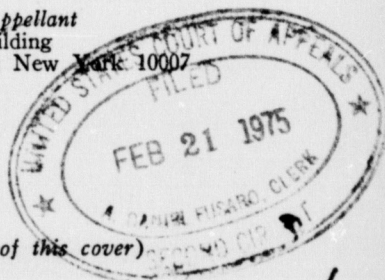
**APPENDIX**

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*Corporation Counsel of the City of*  
*New York*

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(Additional list of signatures appear on reverse side of this cover)



PAGINATION AS IN ORIGINAL COPY

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## APPENDIX

### **Docket Entries**

<i>Date</i>	<i>Proceedings</i>
2- 8-74	Filed complaint and issued summons.
2-26-74	Filed Answer to Complaint by deft. Emery Roth & Sons.
3- 1-74	Filed deft. Emery Roth & Sons answer to cross-claim of deft. Raisler.
3- 7-74	Filed summons with marshals return. Served: Rutherford Stinard on 2-14-74; Emery Roth by Mary Johnson on 2-13-74; 80 Pine St. Corp. by Mr. T. Kentaing on 2-12-74; Rudin Management Corp by T. Kentaing on 2-12-74; Consolidated Edison Co. by C. G. Sonner, Sr., 2-27-74; Raisler Corp. by F. Larry 2-12-74; Adseo Mfg. Corp. by Mr. Palmer, Pres. 2-19-74.
3-26-74	Filed deft's 80 Pine & Rudin notice to take deposition of plttf.
3-26-74	Filed deft's 80 Pine & Rudin interrogs.
3-26-74	Filed Answer to complaint by deft's 80 Pine & Rudin.
3-26-74	Filed deft's Emery Roth & Sons interrogs to plttf.
4- 1-74	Filed plttf's affidavit & notice of motion to vacate deft's 80 Pine St. Corp. notice of deposition ret. 4-10-74.

*Docket Entries*

<i>Date</i>	<i>Proceedings</i>
4- 1-74	Filed plttf's memorandum of law in support of its motion for a protective order.
3-29-74	Filed deft's Emery Roth & Sons notice to take deposition of plttf. & Co-deft's.
4- 4-74	Filed affidavit of R. E. Quirk in opposition to plttf's motion for a protective order.
3-29-74	Filed reply of Emery Roth & Sons to the cross-complaint of deft's, 80 Pine St. & Rudin Management.
4- 2-74	Filed Answer with cross-complaint by deft. Adseo Mfg. Corp.
4- 2-74	Filed Answer to cross-complaint by deft Adseo Mfg Corp to deft Raisler Corp.
4- 2-74	Filed Answer to cross-complaint by deft. Adseo to deft. Emery Roth & Sons.
4-16-74	Filed Answer to cross-complaint by deft. Consolidated Edison Co.
4-16-74	Filed deft's Con. Edison Co. demand for interrogos.
4-16-74	Filed Answer to complaint by Con. Edison Company, of cross-complaint of deft's 80 Pine St. & Rudin Mgm. Corp.
4-18-74	Filed affirmation in opposition of S. I. Goldberg in opposition to plttf's motion ret 4-19-74.



*Docket Entries*

<i>Date</i>	<i>Proceedings</i>
4-23-74	Filed Deft. Consolidated Edison Co. of NY Inc.'s Answer to Cross-Complaint.
4-19-74	Filed Answer of Deft. Emery Roth & Sons to Cross-Complaint of Deft. Adseo Manufacturing.
4-19-74	Filed Answer of Deft. Emery Roth & Sons to Cross-Complaint of Deft. Consolidated Edison Company.
4-29-74	Filed Deft. Consolidated Edison Co. of NY, Inc. Cross-Notice to Take Deposition of plttf & co-defts.
4-29-74	Filed Deft. Adseo Manufacturing Corporation Answer to Cross-Complaint.
5-10-74	Filed order to plttf's motion is granted to the extent that deft be directed to serve written interros upon the plttf with leave to take the deposition of plttf. at a time subsequent to the service & response to said interros. Knapp, J.
5-17-74	Filed stip to order time of deft Stinard to answer complaint is ext to 5-21-74. Knapp, J.
5-15-74	Filed Answer to Complaint by deft Rutherford Stinard.
6-12-74	Filed deft's 80 Pine St. & Rudin Mgmt. Co. interros to plttf.

*Docket Entries*

<i>Date</i>	<i>Proceedings</i>
6-24-74	Filed plttf's affidavit & notice of motion to consolidate this action with 74 Civ 905. Ret. 7-16-74.
6-20-74	Filed Defts 80 Pine and Rudin Answer to Cross-complaint, para. 7, 8 & 9.
6-20-74	Filed Defts 80 Pine and Rudin Answer to Cross-complaint, para. 10 & 11.
6-27-74	Filed affidavit of L. Esterman in support of motions to consolidate actions.
7-17-74	Filed Memo-endorsed on plttf's motion filed 6-24-74 to consolidate: Motion granted on default of all deft's, but for deft. Emery Roth, & Sons, who consent to plttf's motion. Action 74 Civ 905 consolidated with 74 Civ 670. So ordered. Knapp, J. m/n
9-30-74	Filed The City of N.Y. affirmation & Notice of motion for, an order of protection ret. 10-11-74.
9-30-74	Filed The City of N. Y. memorandum of law in support of motion, ret. 10-11-74.
9-19-17	Filed plttf's notice to take deposition of R.L. Stinard.
9-30-74	Filed Answer to cross-complaint of deft's 80 Pine St. & Rudin Management Corp.

*Docket Entries*

<i>Date</i>	<i>Proceedings</i>
9-30-74	Filed Answer to cross-claim of Adscs Mfg. Corp.
9-30-74	Filed Answer to cross-claim of Co-Deft. Consolidated Edison.
9-30-74	Filed Answer to cross-claim of deft. Reisler Corp.
9-30-74	Filed Answer to cross-claim of deft. Emery Roth & Sons.
10-11-74	Filed Memo-endorsed on motion by Corporation Counsel filed 9-30-74: Referred to Magistrate Jacobs to hear & report. Knapp, J.
10-21-74	Filed Stip & order that affirmative defense to the plttf's complaint, which states as follows: The court does not have jurisdiction over the deft's is withdrawn. Pltff waives an examination before trial of the deft. Rutherford L. Stinard. Knapp, J.
11-15-74	Filed Memorandum & Order that Magistrate Jacobs' report is eminently fair, approve its recommendations & direct the parties to arrange prompt compliance therewith. So ordered. Knapp, J.
12-12-74	Filed Notice of Appeal by The City of N.Y. et al from order entered 11-15-74. Mailed copies to H. H. Lipsig, Morris, Duffy, Ivone & Jensen, Craig & Green, Hart & Hume, Quirk



*Docket Entries**Date**Proceedings*

& Bakalor, Hanner, Onoraato & Hogarty & Williams & O'Neill.

- 12-24-74 Filed plttf's affidavit & notice of motion to find the City of N. Y. & Louis Beck in contempt of court ret. 1-10-75.
- 12-30-74 Filed Memo-endorsed on plttf's motion filed 12-24-74. Motion referred to Magistrate Jacobs to hear & report. Knapp, J.
- 1- 9-75 Filed deft's (City of N. Y.) affidavit & notice of cross-motion for an order staying the enforcement order ret. 1-10-75.
- 1-16-75 Filed affidavit of K. Concagh in reply to affidavit of Jack Cherrill.
- 1-16-75 Filed plttf's memorandum of law in support of his motion to hold respondents in contempt.
- 1-16-75 Filed affidavit of Dennis M. Karsch in opposition to affidavit of Louis Beck.
- 1-16-75 Filed order that plttf's motion for contempt is denied. The cross motion of the City of N. Y. & Louis Beck, for a stay pending appeal is granted. Knapp, J. m/n
- 1-14-75 Filed notice that record on appeal has been certified & transmitted to the USCA this 14th day of Jan. 1975.

**Summons**

UNITED STATES DISTRICT COURT  
FOR THE  
SOUTHERN DISTRICT OF NEW YORK  
Civil Action File No. 74 Civ. 670

---

MATTIE G. DIXON, as Administratrix of the Estate of  
L. C. SHERMAN, JR.,  
Plaintiff,

v.

80 PINE STREET CORPORATION, RUDIN MANAGEMENT CORP.,  
RAISLER CORP., THE CONSOLIDATED EDISON COMPANY OF  
NEW YORK, ADSCO MANUFACTURING CORP., RUTHERFORD  
STINARD, EMERY ROTH, RUTHERFORD ROTH and JULIAN  
ROTH, doing business as EMERY ROTH & SONS,  
Defendants.

---

To the above named Defendants:

You are hereby summoned and required to serve upon Harry H. Lipsig plaintiff's attorney, whose address 100 Church Street, New York, N. Y. 10007, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by

8a

*Summons*

default will be taken against you for the relief demanded in the complaint.

RAYMOND F. BURGHARDT,  
*Clerk of Court.*

/s/ B. EDWARDS,  
*Deputy Clerk.*

(Seal of Court)

U. S. District Court

Filed—Mar. 7, 1975

S. D. of N. Y.

Date: Feb 8 1974

**Complaint**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 670

---

MATTIE G. DIXON, as Administratrix of the Estate of  
L. C. SHERMAN, JR.,  
Plaintiff,

—against—

80 PINE STREET CORPORATION, RUDIN MANAGEMENT CORP.,  
RAISLER CORP., THE CONSOLIDATED EDISON COMPANY OF  
NEW YORK, ADSCO MANUFACTURING CORP., RUTHERFORD  
STINARD, EMERY ROTH, RUTHERFORD ROTH and JULIAN  
ROTH, doing business as EMERY ROTH & SONS,  
Defendants.

---

PLAINTIFF DEMANDS TRIAL BY JURY

Plaintiff, by her attorney Harry H. Lipsig, alleges:

1. Plaintiff is a citizen of the State of Florida and upon information and belief, defendants are citizens of a State other than Florida.

2. The matter in controversy exceeds the sum of \$10,000, exclusive of costs and interest.



*Complaint*

3. By reason of the amount in controversy and diversity of citizenship, this Court has jurisdiction.

4. Heretofore, and prior to the commencement of this cause of action, plaintiff Mattie G. Dixon was appointed Administratrix of the Estate of L. C. Sherman, Jr. by order of the Surrogate, County of New York, in February 1974, has qualified, entered upon the discharge of her duties and is now acting as such.

5. On or about May 3, 1972, L. C. Sherman, Jr. died intestate and left him surviving his child Alicia Lashon Sherman, a citizen of Florida, whose guardian is the within plaintiff.

6. Defendant 80 Pine Street Corporation was and still is a domestic corporation, duly licensed and existing under and by virtue of the laws of the State of New York, with its principal place of business in the Borough of Manhattan, City and State of New York.

7. Defendant Rudin Management Corp. was and still is a domestic corporation, duly licensed and existing under and by virtue of the laws of the State of New York, with its principal place of business in the Borough of Manhattan, City and State of New York.

8. Defendant Raisler Corp. was and still is a domestic corporation, duly licensed and existing under and by virtue of the laws of the State of New York, with its principal place of business in the Borough of Manhattan, City and State of New York and is regularly engaged in the business of installing and maintaining steam facilities.



*Complaint*

9. Defendant The Consolidated Edison Company of New York (hereafter "Con Ed") was and still is a gas and electric corporation, duly organized and existing under and by virtue of the laws of the State of New York within the purview of the public service law and transportation corporation law of New York State with its principal place of business in the Borough of Manhattan, City and State of New York and duly licensed and franchised to do business in New York State and under a duty to provide safe and adequate service, instrumentalities and facilities.

10. Defendant Con Ed was regularly engaged in, among other things, the business of generating steam in New York City and elsewhere for the purposes of heating and air-conditioning public and private buildings and in the business of furnishing to the inhabitants of the City of New York steam under and pursuant to rights granted to them and did supply steam under pressure in and about the premises 80 Pine Street, New York, New York.

11. At all times hereinafter mentioned, defendant 80 Pine Street Corporation was the owner of the land, buildings and property of premises known as 80 Pine Street, New York, New York.

12. At all times hereinafter mentioned, defendant Adscs Manufacturing Corp. (hereafter "Adscs") was and still is a domestic corporation, duly licensed and existing under and by virtue of the laws of the State of New York with its principal place of business at 20 Milburn Street, in the City of Buffalo, State of New York and is regularly engaged in the business of manufacturing, assem-

*Complaint*

bling and providing steam equipment, facilities and instrumentalities.

13. At all times hereinafter mentioned, defendant Emery Roth, Richard Roth and Julian Roth doing business as Emery Roth & Sons (hereafter "Emery Roth"), were and still are architects duly licensed and existing under and by virtue of the laws of the State of New York, with their principal place of business in the Borough of Manhattan, City and State of New York.

14. At all times hereinafter mentioned, defendant Rutherford Stinard was and still is a mechanical engineer, doing business in the State of New York, with his principal place of business at 700 Summer Avenue, Stamford, Connecticut.

15. At all times hereinafter mentioned, defendant 80 Pine Street Corporation had not parted with the possession of said land, building, property and premises, except for the right of occupancy by various tenants, and controlled, managed, operated and maintained said premises and the building thereon and each and every part thereof.

16. Said premises, 80 Pine Street, New York, New York, were commercial premises and were used for offices and other commercial purposes.

17. Defendant Rudin Management Corp. was the managing agent for the defendant 80 Pine Street Corporation, and as such agent, managed, operated and controlled all the land, buildings and property in premises known as 80 Pine Street, New York, New York.

*Complaint*

18. At all times hereinafter mentioned, the defendant Raisler Corp. installed and maintained the steam pipes in the aforesaid building known as 80 Pine Street, New York, New York.

19. Defendant Adscio, in the regular course of its business, manufactured, assembled, fitted and sold expansion joints to the defendants, which were and still are being used in or about the said commercial premises.

20. Defendant Emery Roth, in the course of its business designed, detailed and engineered the plans, specifications and blue prints used in the design, construction and assembly of the said commercial building known as 80 Pine Street, New York, New York.

21. Defendant Rutherford Stinard, in the course of his business, determined the specifications, details and dimensions of the said building design and more particularly, but not limited to the specified valves, joints and appurtenances thereto.

22. Plaintiff's intestate was lawfully upon said premises 80 Pine Street, New York, New York, when a steam explosion occurred thereat on or about May 3, 1972.

23. Defendants, their agents, servants and employees, were negligent in permitting said premises to be in an unsafe and dangerous condition and in subjecting plaintiff's intestate to unnecessary and unusual hazards and risks.

24. Solely, due to the aforesaid negligence of the defendants, the plaintiff's intestate was caused to suffer injuries which resulted in his death on May 3, 1972.



*Complaint*

25. By reason of the aforesaid, plaintiff and Alicia Lashon Sherman have been deprived of the comfort, society and services of L. C. Sherman, Jr. and have incurred expenses and loss of inheritance, all to their damage in the sum of \$1,000,000.

SECOND CAUSE OF ACTION AS AGAINST DEFENDANTS  
CON ED, RAISLER CORP. AND ADSCO

26. Plaintiff repeats and realleges the allegations of the complaint herein numbered 1 through 25, as though fully set forth herein.

27. Defendants Raisler Corp. and AdscO, in their regular course of their business, by their agents, servants and/or employees did warrant expressly and impliedly to 80 Pine Street Corporation and Rudin Management Corp., their agents, servants and/or employees and to the general public, that their steam pipe and/or pipe valves, joints and appurtenances thereto were reasonably safe for the purpose intended and knew that said steam pipes and/or pipe valves, joints and appurtenances thereto were to be used by the defendants 80 Pine Street Corporation and Rudin Management Corp.

28. Said defendants, their agents and/or employees, in reliance upon said representations and warranties made by defendants Raisler Corp. and AdscO did purchase said steam pipes and/or pipe valves, joints and appurtenances thereto for use an said commercial premises.

29. At the time of said warranty and sale, said steam, steam pipes and/or pipe valves, joints and appurtenances thereto were not fitted for the uses intended, but on the

*Complaint*

contrary, were dangerously, defectively and negligently designed and manufactured and said defendants breached their warranty.

30. Defendant Con Ed, by its agents, servants and/or employees, did warrant expressly and impliedly to the defendants, their agents, servants and/or employees and the general public, that it would supply pressurized steam for the purposes of heating and air-conditioning said premises known as 80 Pine Street, New York, New York; that said steam would be supplied at a reasonably safe pressure for the purpose intended.

31. Defendants, their agents, servants and/or employees, in reliance upon said representations and warranties made by defendant Con Ed, did purchase and/or contract to purchase pressurized steam for use in said premises known as 80 Pine Street, New York, New York.

32. At the time of the warranty and sale, said pressurized steam was not fit for the use intended but on the contrary, was dangerously and hazardously supplied on said premises known as 80 Pine Street, New York, New York.

33. By reason of the aforesaid, plaintiff was damaged in the sum of \$1,000,000.

## THIRD CAUSE OF ACTION

34. Plaintiff repeats and realleges the allegations of the complaint herein numbered 1 through 33, as though fully set forth herein.

*Complaint*

35. Decedent, L. C. Sherman, Jr., prior to his death on May 3, 1972, sustained great severe permanent injuries to his body and limbs, suffered pain, shock, physical and mental anguish, solely as a result of the aforesaid.

36. By reason thereof, plaintiff is entitled to damages in the sum of \$500,000.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of \$2,500,000, with costs, interest and disbursements permitted by law.

HARRY H. LIPSIG  
Attorney for Plaintiff  
100 Church Street  
New York, New York 10007  
Tel: (212) 732-9000

**Subpoena Served on Louis Beck**

UNITED STATES DISTRICT COURT  
FOR THE  
SOUTHERN DISTRICT OF NEW YORK  
Civil Action File No. 74 Civ. 551

---

MATTIE G. DIXON, as Administratrix of the Estate of  
L. C. SHERMAN, JR.,

*vs.*

80 PINE STREET CORP., RUDIN MANAGEMENT CORP., RAISLER  
CORP., THE CONSOLIDATED EDISON COMPANY OF NY, ET  
AL.,

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To

LOUIS BECK, Esq., Legal Counsel to the Board of In-  
quiries of the City of New York, 100 Gold Street, New  
York, New York

YOU ARE COMMANDED to appear at the office of Harry  
H. Lipsig, Esq. 100 Church Street, New York, N.Y., Rm.  
1502 in the City of New York on the 30th day of Septem-  
ber, 1974, at 10:00 o'clock A. M. to testify on behalf of  
plaintiff at the taking of a deposition in the above en-  
titled action pending in the United States District Court  
of the Southern District of New York and bring with you



*Subpoena Served on Louis Beck*

1. A full and complete copy of the report prepared by the Board of Inquiries of the City of New York relating to and dealing with the 80 Pine Street explosion occurring on May 3, 1972 at the aforesaid premises.
2. A list of any and all names and addresses of witnesses appearing and testifying before the aforesaid Board of Inquiries relating to the aforesaid explosion on May 3, 1972.
3. Any and all files, expansion joints and other apparatus and any other appurtenances which were examined by members of the Board of Inquiries or by experts at their request with a full and complete copy of their report.

\* \* \* NOTE \* \* \*

With reference to Item No. 3, should it become unduly burdensome to transport the aforesaid items of equipment please contact us and due arrangements will be made.

HARRY H. LIPSIG  
Harry H. Lipsig

Dated: September 19, 1974.

HARRY H. LIPSIG  
Attorney for Plaintiff  
100 Church Street, NYC

RAYMOND F. BURGHARDT,  
Clerk.

By B. EDWARDS,  
Deputy Clerk.



*Subpoena Served on Louis Beck*

Any subpoenaed organization not a party to this suit is hereby admonished pursuant to Rule 30 (b) (6), Federal Rules of Civil Procedure, to file a designation with the court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which he will testify or produce documents or things. The person so designated shall testify as to matters known or reasonably available to the organization.

**Notice of Motion to Quash Subpoena**

UNITED STATES DISTRICT COURT  
FOR THE  
SOUTHERN DISTRICT OF NEW YORK

---

[SAME TITLE]

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SIR:

PLEASE TAKE NOTICE that the undersigned will move this Court at a Term Promotions at the United States Courthouse, Room 129, Foley Square, New York, N. Y., on the 11 day of October, 1974, at 2 o'clock, P.M., or as soon as Counsel can be heard, for an Order of Protection, pursuant to Rule 45 (b), Rule 45 (c), and Rule 26 (c) F.R. C.P. quashing a subpoena dated September 19, 1974, directed to Louis Beck, Esq., Legal Counsel to the Board of Inquiries of the City of New York, to testify or produce documents, or things, upon the grounds of privilege, unreasonableness, undue burden, and non-possession of items sought for discovery and inspection, and for such other and further relief as the Court may deem just and proper.

Dated: New York, N. Y.,  
September 24, 1974

Yours, etc.,

ADRIAN P. BURKE  
Corporation Counsel of  
THE CITY OF NEW YORK  
Counsel to the Petitioner  
By /s/ JACK CHERRILL  
Assistant Corporation Counsel

21a

*Notice of Motion to Quash Subpoena*

To:

HARRY H. LIPSIG, Esq.  
Attorney for Plaintiff  
100 Church Street  
New York, N. Y.

**Affirmation of Louis Beck in Support of Motion**

UNITED STATES DISTRICT COURT  
FOR THE  
SOUTHERN DISTRICT OF NEW YORK

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**[SAME TITLE]**

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LOUIS BECK, being duly sworn, deposes and says:

That he is Legal Counsel to the Board of Inquiries of the City of New York for the Department of Buildings.

This affirmation is submitted in support of an application to quash a subpoena dated September 19, 1974, served upon him. The subpoena service was not accompanied by the payment of any fee.

The City of New York does not appear to be a defendant in the action, and the plaintiff seeks to obtain a copy of a report of the Board of Inquiries relating to a steam-pipe explosion at 80 Pine Street in New York City on May 3, 1972, with respect to which the Board was convened to inquire into and ascertain the facts, study the cause or causes of the accident, for the purposes of formulating remedial legislation or regulations intended to prevent said occurrences in the future, and determine if there was a violation of the Building Code and/or any of the Rules and Regulations governing holders of Department of Buildings licenses.

It is the experience of deponent that in order to perform its function, often there must be assurances given



*Affirmation of Louis Beck in Support of Motion*

to prospective witnesses that their testimony will be treated as confidential, in order to elicit information that might otherwise not be forthcoming, or as to which constitutional protection may be claimed by such witnesses. Since a major responsibility of the Board is to prevent similar occurrences in the future by reason of the knowledge demanded, it is submitted that the public interest requires that the testimony given at such a Board of Inquiries should be protected, and a plaintiff referred to other more customary means of seeking to establish his cause of action.

The names and addresses of witnesses who appear and testify are included in such a report, and the preparation of a separate list would be burdensome and expensive to the witnesses and to the City of New York to review and obtain same from an extensive report. Finally, physical evidence presented to the Board and examined by it or its experts have been returned to the owner of the building, so that same are in the possession of the witnesses.

WHEREFORE, it is asked that the motion be granted, and the subpoena quashed.

/s/ LOUIS BECK

(Sworn to by Louis Beck on September 27, 1974.)

**Affidavit of Dennis M. Karsch  
in Opposition to Motion**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

SAME TITLE

---

STATE OF NEW YORK     }  
COUNTY OF NEW YORK } ss.:

DENNIS M. KARSCH, being duly sworn, deposes and says:

I am an attorney associated with the firm of Harry H. Lipsig, attorney for the plaintiff herein, and make this affidavit in opposition to the affidavit of Louis Beck, requesting this Court to issue a protective order pursuant to Rule 45(b) quashing a subpoena requiring the Board of Inquiries of the City of New York to produce for discovery and inspection in the within action a report relating to the steam pipe explosion occurring at 80 Pine Street, New York, New York, on May 3, 1972 in which seven people lost their lives.

Rule 26 of the Federal Rules of Civil Procedure states that parties "may obtain discovery *regarding any matter*, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . ." The Rule goes on further to state that where justice requires to protect

*Affidavit of Dennis M. Karsch  
in Opposition to Motion*

a person or party from annoyance, embarrassment, oppression or undue burden or expense the Court may make one or more orders regulating or denying the discovery.

Mr. Beck states in his affidavit that the preparation of a list containing the names and addresses of witnesses who appeared and testified before the Board of Inquiries would be unduly burdensome and expensive to the City of New York. In this respect we must wholeheartedly disagree. To begin with Mr. Beck fails to indicate how many people, in terms of numbers, testified before the Board of Inquiries. Certainly, the Court would be entitled to at least a minimum showing by the City that the number of witnesses was in the hundreds or perhaps in the thousands. In the absence of this showing, Mr. Beck's contention is without merit. To go on further, The Board states that the physical evidence examined by them has been returned to the owners of the building. Your deponent is not in the position to deny this fact. However, upon calling the attorneys for the Rudin Management Corp., the owner-manager of the building, I was informed by Mr. Robert Quirk that he had no knowledge of the return of any equipment. I call upon Mr. Beck to amplify this matter at the time of argument on this motion.

In a related action brought by our office in the Supreme Court of the State of New York involving the identical explosion, your deponent sought to obtain the Board's report along with the other items requested herein. The Board, once again, opposed the motion and argued on two basis, one that sections 1113 and 1114 of the City Charter precluded discovery and two the argument of common law privilege. Both the lower Court and the Appellate Division (1st Dept.) granted plaintiff's motion for discovery.



*Affidavit of Dennis M. Karsch  
in Opposition to Motion*

The Court of Appeals, however, reversed it on the grounds that plaintiff had not made a sufficient showing for the need to obtain the report. It should be noted that the Court, in their decision, struck down the City's contentions as to the exclusionary clauses of section 1114 and in no way stated that a common law privilege existed. A copy of this decision is annexed hereto as Exhibit "A".

With respect to the failure to serve a proper fee along with the subpoena, your deponent asks the Court in the interest of justice to refrain from quashing the subpoena on this basis alone.

In the final analysis, the Court in this action is confronted with a situation which is prevalent today when any major catastrophe occurs in New York City. Under previous policies, the reports of the Department of Buildings, the Fire Department and the Police Department were readily obtainable in connection with explosions and other disasters. However, as a result of this new trend towards convening special Boards of Inquiry, parts and equipment involved in the explosion which are essential to the proof and/or defense of a litigant's case are sequestered and not returned to the respective parties until many years have elapsed. The Board then compounds the injustice under the crimson cloak of confidentiality, claiming that their report regarding the explosion is privileged because prospective witnesses will not be readily forthcoming to testify in other catastrophes is abhorrent to our judicial system. Your deponent fails to see the harm that can be done to the public interest if these documents were made available solely to the parties in this action. The Court, if it desires, can order an *in camera* inspection of this report and order it sealed to prevent outside



*Affidavit of Dennis M. Karsch  
in Opposition to Motion*

parties from viewing it. To grant the City's motion would in effect mean that discovery proceedings in similar accident cases would take well over many years from the date of the occurrence until the City released or returned the equipment hopefully in the same form as it was originally taken.

WHEREFORE, it is respectfully requested that the Court deny respondent's motion to quash the subpoena in all respects.

/s/ DENNIS M. KARSCH

(Sworn to by Dennis M. Karsch on October 4, 1974.)

**Exhibit A Annexed to Affidavit of Dennis M. Karsch  
in Opposition to Motion**

**New York Court of Appeals Opinion, with dissenting  
opinion of Gabrielli, J.**

STATE OF NEW YORK  
COURT OF APPEALS

1

No. 268

73

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DON CIRALE, as Administrator &c.,  
Plaintiff-Respondent,  
*vs.*

80 PINE STREET CORPORATION, & ORS,  
Defendants-Respondents,

BOARD OF INQUIRY OF THE DEPARTMENT OF BUILDINGS OF  
THE CITY OF NEW YORK, &c.,  
*Appellant,*

THE CONSOLIDATED EDISON COMPANY OF NEW YORK,  
*Defendant.*

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JASEN, J.:

This appeal arises out of a tragic steam pipe explosion at 80 Pine Street in New York City on May 3, 1972, which resulted in the death of seven persons, one of which was plaintiff's intestate. Immediately after the accident, a Board of Inquiry was convened at the direction of the

*Exhibit A Annexed to Affidavit of Dennis M. Karsch  
in Opposition to Motion  
New York Court of Appeals Opinion*

Commissioner of Buildings "to inquire into and ascertain the facts, state the cause or causes of the accident for the purposes of formulating remedial legislation or regulations intended to prevent similar occurrences in the future and determine if there was a violation of the Building Code and/or any of the rules and Regulations governing holders of Department of Buildings' licenses."

Meanwhile, on May 19, 1972, the within wrongful death action was commenced against the defendants. The City of New York is not a party to the action. Pursuant to CPLR sections 3101 and 3120, the plaintiff moved against the Board of Inquiry for an order for discovery and inspection of:

"A. Any and all lists of the names and addresses of witnesses appearing before the Board of Inquiry whose testimonies relate to the 80 Pine explosion which occurred at 80 Pine Street, New York, New York, on May 3, 1972;

B. Any and all statements made by witnesses appearing before the Board of Inquiry relating to the above said explosion;

C. Any and all documents, reports, records, notes, letters, memoranda and/or things which the Board of Inquiry had access to and which relate to the investigation of the above said explosion;

D. The entire content of the report of the Board of Inquiry relating to the May 3, 1972 explosion which occurred at 80 Pine Street, New York, New York."

The various named defendants cross-moved for the same purpose.

*Exhibit A Annexed to Affidavit of Dennis M. Karsch  
in Opposition to Motion  
New York Court of Appeals Opinion*

Special Term, in granting the motion, held that "[t]he information sought is material and necessary to the prosecution of this action" and that "the Board of Inquiry has special and exclusive knowledge of the events surrounding the explosion." The Appellate Division affirmed and certified the following question: "Was the order of the Supreme Court, as affirmed by this Court, properly made?"

The order should be reversed and the question answered in the negative. The scope of disclosure which may be made against a non-party witness is set forth in Article 31 of the CPLR. While CPLR section 3101 opens with the sweeping exhortation that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof", it then provides the limitation that disclosure as against a non-party may only be had "where the court on motion determines that there are adequate special circumstances."

We cannot say, on the record before us, that the respondents have shown "adequate special circumstances", as required by CPLR section 3101(a)(4), to be entitled to the relief sought. Nowhere do they indicate what endeavors, if any, were undertaken to obtain the facts and circumstances leading to the explosion. All that the respondents show is that "since [the Board's] investigation was the only one taken relating to the above said explosion, its results and contents are *material and necessary* to the proof of [their] case." (Emphasis supplied.) Although this allegation may have some bearing on the issue whether the information sought is "material and necessary" to the prosecution of the action, it certainly does not satisfy the additional requirement of the statute that



*Exhibit A Annexed to Affidavit of Dennis M. Karsch  
in Opposition to Motion  
New York Court of Appeals Opinion*

"adequate special circumstances" be shown. Nor is the bare assertion of special circumstances sufficient; there must be specific support for the claim. It may very well be that the respondents, after conducting their investigation, may not be able to obtain sufficient independent evidence of the facts and circumstances leading to the explosion in order to establish their claim of negligence and breach of warranty. That, of course, could be a circumstance for the court to consider in passing on a new application for discovery and inspection of the records of the Board of Inquiry.

There is also presented in this case the City's claim that the information sought is privileged and confidential. Of course, if the information sought is in fact privileged, it is not subject to disclosure no matter how strong the showing of need or relevancy. CPLR § 3101[b], *supra*; see also, Practice Commentary, Siegel, McKinney's Cons. Laws of N. Y., Book 7B, CPLR 3101, p. 29.)

As part of the common law of evidence, "official information" in the hands of governmental agencies has been deemed in certain contexts, privileged.<sup>1</sup> Such a privilege attaches to "confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such con-

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<sup>1</sup> This common-law privilege has been codified in some jurisdictions. (See, e.g., California Evidence Code, § 1040; *Flournoy v. Superior Court for County of Los Angeles*, 34 Cal. App. 3d 398; see also, ALI Model Code of Evidence, Rule 228.) Although the legislature has recently passed the Freedom of Information Law (Laws of 1974, Chs. 578, 579 and 580), it does not abolish the common-law privilege for official information.

*Exhibit A Annexed to Affidavit of Dennis M. Karsch  
in Opposition to Motion  
New York Court of Appeals Opinion*

fidential communications or the sources should not be divulged." (*People v. Keating*, 286 App. Div. 150, 153; see generally, M. M. Carrow—Governmental Nondisclosure in Judicial Proceedings, 107 U. of Pa. L. Rev. 166.) The hallmark of this privilege is that it is applicable when the public interest would be harmed if the material were to lose its cloak of confidentiality. (8 Wigmore on Evidence [McNaughton revision], § 2378; Richardson on Evidence, 10th ed., Prince § 456, p. 446; Mottola, New York Evidence, Proof of Cases, 2d ed., § 394; *Matter of Langert v. Tanney*, 5 A D 2d 586.) It has been said that the privilege is a qualified one, which may be ineffective when it appears that the disclosure of the privileged information is necessary to avoid the risk of false testimony or to secure useful testimony. (See *People v. Keating*, *supra*, at p. 153.) While this test may be appropriate in criminal cases,<sup>2</sup> we would reject any such qualification in civil cases, since the privilege would become meaningless if it could be breached in order to secure "useful testimony". Any testimony, if relevant to the action at bar, may be said to be useful. While some commentators have argued that the privilege is qualified and requires a balancing of the needs of the litigants against the potential harm to the public interest that may result from disclosures (see 42 Fordham L. Rev. 807; 107 U. of Pa. L. Rev. 166, *supra*), these, in reality, are two sides of the same coin. Public interest encompasses not only the needs of the government, but also the societal interests in re-

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<sup>2</sup> Different considerations may be applicable in criminal cases where the privileged information may be relevant to proof of innocence. (See *Matter of Langert v. Tanney*, *supra*, at p. 589.) We do not now consider the scope of the privilege in such cases.

*Exhibit A Annexed to Affidavit of Dennis M. Karsch  
in Opposition to Motion  
New York Court of Appeals Opinion*

addressing private wrongs and arriving at a just result in private litigation. Thus, the balancing that is required goes to the determination of the harm to the overall public interest. Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure. While the need of a litigant for the information would present a strong argument for disclosure, the court should balance such need against the government's duty to inquire into and ascertain the facts of a serious accident for the purposes of taking steps to prevent similar occurrences in the future.

By our decision today, we do not hold that all governmental information is privileged or that such information may be withheld by a mere assertion of privilege. There must be specific support for the claim of privilege. Public interest is a flexible term and what constitutes sufficient potential harm to the public interest so as to render the privilege operable must of necessity be determined on the facts of each case. Such a determination is a judicial one and requires that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information. Otherwise, the privilege could be easily abused, serving as a cloak for official misconduct. (8 Wigmore on Evidence [McNaughton Rev.], § 2379, pp. 803-810; *United States v. Reynolds*, 345 U. S. 1; *Stratford Factors v. State Banking Dept.*, 10 A D 2d 66.) Of course, in some situations it may be difficult to determine if the assertion of the privilege is warranted without forcing a disclosure of the very thing sought to be withheld. In such situations, it



*Exhibit A Annexed to Affidavit of Dennis M. Karsch  
in Opposition to Motion  
New York Court of Appeals Opinion*

would seem proper that the material requested be examined by the court *in camera*. (See *United States v. Reynolds*, *supra*; *Stratford Factors v. State Banking Dept.*, *supra*.) However, it will be the rare case that *in camera* determinations will be necessary. A description of the material sought for the purpose for which it was gathered and other similar considerations will usually provide a sufficient basis upon which the court may determine whether the assertion of governmental privilege is warranted.

As to the City's claim of privilege under sections 1113 and 1114 of the New York City Charter, we hold these sections inapplicable. These sections do not confer complete immunity from discovery, but merely exclude certain papers from the requirement of mandatory disclosure of public records.

Accordingly, the order of the Appellate Division should be reversed with leave to the respondents to proceed in accordance with Article 31 of the CPLR. If further disclosure proceedings are pursued, the City shall be allowed to object, asserting its claim of common-law privilege upon a proper showing that the privilege is warranted.



*Exhibit A Annexed to Affidavit of Dennis M. Karsch  
in Opposition to Motion*

**Dissenting Opinion of Gabrielli, J.**

STATE OF NEW YORK  
COURT OF APPEALS

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SAME TITLE

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GABRIELLI, J. (dissenting):

The decision at Special Term affirmed unanimously at the Appellate Division appears to me to be correct in every respect. I find no particular authority for the majority's insistence that respondents show their inability otherwise to obtain the sought after information. While such might be requisite to obtaining information gathered by another party to the action (*Hickman v. Taylor*, 329 U.S. 495), it is not demonstrated by the majority why such a rule should obtain where the information has been gathered by an investigatory government agency which is not a party, nor likely to be involved in related litigation. Furthermore, where there has been an incident of the magnitude involved in the case at bar, and where surely the government investigation should not have to be duplicated by plaintiffs in wrongful death actions, the "special circumstance" criterion of CPLR section 3101 (a)(4) has been met (see Practice Commentary, Siegel, McKinney's Cons. Laws of N.Y., Book 7B, C 3101:22, pp. 25-27).

The question whether the sought after information, while ostensibly discoverable under CPLR section 3101 (a)(4) might nevertheless be protected by the common

*Exhibit A Annexed to Affidavit of Dennis M. Karsch  
in Opposition to Motion  
Dissenting Opinion of Gabrielli, J.*

law "public interest" privilege has already been determined below and is not properly before us. Special Term specifically mentioned the City's privilege argument and just as specifically made a finding that the claim was unsupported. Since no specific error in that ruling is here asserted by the City it is difficult for me to understand why the majority desires to force plaintiffs to jump the hurdle again.

Finally, I take particular exception to the broad "holding" in the majority's first footnote that the new Freedom of Information Law, to become effective September 1, 1974, "does not abolish the commonlaw privilege for official information." Whether it does or not is not before us in this case and has not been briefed. It is wrong thus to construe a statute not yet even in effect.

I would affirm the determination appealed from and answer the certified question in the affirmative.

\* \* \*

Order reversed, without costs, and the motion and cross-motions for discovery denied, with leave to renew. Question certified answered in the negative. Opinion by Jasen, J. All concur except Gabrielli, J., who dissents and votes to affirm in an opinion in which Stevens, J., concurs.

**Memorandum and Order of Knapp, J.**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

MATTIE G. DIXON, as Administratrix of the Estate of  
L. C. SHERMAN, Jr.,  
Plaintiff,

—against—

80 PINE STREET CORPORATION, RUDIN MANAGEMENT CORP.,  
RAISLER CORP., THE CONSOLIDATED EDISON COMPANY OF  
NEW YORK, ADSCO MANUFACTURING CORP., RUTHERFORD  
L. STINARD, EMERY ROTH, RICHARD ROTH and JULIAN  
ROTH d/b/a EMERY ROTH & SONS,  
Defendants.

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This is a personal injury action resulting from a steam pipe explosion at 80 Pine Street, New York City, on May 3, 1972. A Board of inquiry was convened at the direction of the Commissioner of Buildings "to inquire into and ascertain the facts, state the cause or causes of the accident for the purposes of formulating remedial legislation or regulations intended to prevent similar occurrences in the future and determine if there was a violation of the Building Code and/or any of the rules and regulations governing holders of Department of Buildings' licenses." In September 1974 plaintiff served a subpoena on the City, not a defendant in this action, seeking (1) a complete copy of the report of the Board, (2) a list of the names and addresses of witnesses who testified be-



*Memorandum and Order of Knapp, J.*

fore the Board, and (3) joints and other physical evidence examined by the Board and a complete copy of its report. By motion dated September 24, 1974 the City has moved to quash the subpoena on the grounds, among others, of privileges and undue burden.

The matter came before me on October 10, 1974, when I ruled that there was no general privilege to withhold the data requested.<sup>1</sup> Since the City had presented no facts indicating to what extent, if any, it would be "burdened" by production of the matter subpoenaed, my ruling on lack of privilege would in ordinary course have ended the matter. However, attorneys for both parties to the motion (plaintiff and the City) indicated a disposition to accommodate each other, and were agreeable to my suggestion that the matter be referred to a Magistrate. I accordingly referred the motion to Magistrate Jacobs, who has now submitted the annexed report. I find Magistrate Jacobs' report to be eminently fair, approve its recommendations and direct the parties to arrange prompt compliance therewith.

So ORDERED.

Dated: New York, New York  
November 14, 1974.

WHITMAN KNAPP  
Whitman Knapp, U.S.D.J.

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<sup>1</sup> This question is controlled by *Cirale v. 80 Pine Street Corp.* (1974), 35 N.Y.2d 113, 359 N.Y.S.2d 1. In that case, the Court of Appeals held that plaintiff had not shown "adequate special circumstances", as required by CPLR 3101(a)(4), in order to be entitled to the discovery sought. In so holding, the court indicated that based on the record before it, the City had not established its claim of privilege as to this information. The City concedes that the record before me contains nothing that was not presented to the state courts.



**Report of United States Magistrate Jacobs Annexed  
to the Memorandum and Order of Knapp, J.**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 670

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MATTIE G. DIXON, as Administratrix of the Estate of  
L. C. SHERMAN, JR.,  
Plaintiff,

—against—

80 PINE STREET CORPORATION, RUDIN MANAGEMENT CORP.,  
RAISLER CORP., THE CONSOLIDATED EDISON COMPANY OF  
NEW YORK, ADSCO MANUFACTURING CORP., RUTHERFORD  
L. STINARD, EMERY ROTH, RICHARD ROTH and JULIAN  
ROTH d/b/a EMERY ROTH & SONS,  
Defendants.

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TO THE HONORABLE WHITMAN KNAPP, U.S.D.J.:

A hearing was held before me on October 24th at which there appeared counsel for the plaintiff, for the City, for Adseo Manufacturing Corp. (manufacturer of the joint which allegedly caused the explosion), for Richard Roth and Julius Roth (architects), and for Consolidated Edison. At this hearing counsel for the City had in his possession (1) transcripts of testimony of 27 witnesses, to-

*Report of United States Magistrate Jacobs Annexed  
to the Memorandum and Order of Knapp, J.*

gether with exhibits; (2) a report of George J. Fischer, a consulting metallurgist who made an analysis of certain expansion joints and other physical evidence, and (3) the Board of Inquiry report, the latter portions of which contain "conclusions" dealing with the causes of the accident and "recommendations" as to legislation. I was also advised that counsel to the Board (Louis Beck) held certain physical evidence and had returned certain other physical evidence to the owner.

The City stated that if directed by the Court it would have no serious objection to producing the data requested except for the Fischer report and so much of the Board Report which contained the conclusions and recommendations.

Where a governmental body has made an investigation of an accident, public policy dictates that any facts ascertained by it, as distinguished from opinions or conclusions, should be discoverable. However, the discovery of opinions or recommendations may chill a full expression by the investigating body of its views and should as a matter of public policy be protected. This position finds much judicial support. In *Reliable Transfer Co. v. United States*, 53 F.R.D. 24 (E.D.N.Y. 1971) plaintiff claimed damages to a vessel when it ran aground at a point where plaintiff claimed a buoy was not operating. After investigation by the Coast Guard, the government made available the findings of fact of the investigating officer and the transcripts of testimony, but refused to produce the conclusions and recommendations. In upholding the position of the government, Judge Judd said, "The facts found by an investigating officer should be made available to the adversary under general principles of dis-

*Report of United States Magistrate Jacobs Annexed  
to the Memorandum and Order of Knapp, J.*

covery, and are being made available in this case. Free discovery of opinions based on those facts might cause undue reticence by the investigating officer, and prevent fulfillment of the purposes of the investigation" (p. 23). In *Craig v. Eastern Airlines, Inc.*, 40 F.R.D. 508 (E.D. N.Y. 1966) it was decided that the government, defendant in an aviation accident case, need produce only the evidence presented at a hearing before the Civil Aviation Board and factual material but not "conclusions, opinions and recommendations of the FAA expert".

Accordingly, I recommend that the City be directed to produce for inspection and copying by all parties to the action, including defendants, the transcripts of the testimony of all witnesses and related exhibits, the physical evidence, and the report of the Board of Inquiry except for its "conclusions and recommendations".

The Fischer report which I have examined will be separately discussed. This report (consisting of 13 pages and 32 figures or illustrations) was rendered to the Board at its request. The metallurgist did not testify. The report is a metallurgist analysis of certain extension joints and other physical evidence at 80 Pine Street and also of the same type of joint used at two other premises (59 Maiden Lane and One Chase Manhattan Plaza). The latter portion of the report (pp. 11 et seq.) contains certain conclusions. In keeping with my views as to the report of the Board this report should be produced except for its conclusions.

Dated: New York, New York  
November 13, 1974.

Respectfully submitted,

MARTIN D. JACOBS  
Martin D. Jacobs  
United States Magistrate



**Notice of Appeal**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

MATTIE DIXON, as Administratrix of the Estate of L. C.  
SHERMAN, JR.,

Plaintiff,

—against—

80 PINE STREET CORPORATION, RUDIN MANAGEMENT CORP.,  
RAISLER CORP., THE CONSOLIDATED EDISON COMPANY OF  
NEW YORK, ADSCO MANUFACTURING CORP., RUTHERFORD  
L. STINARD, EMERY ROTH, RICHARD ROTH and JULIAN  
ROTH d/b/a EMERY ROTH & SONS,

Defendants.

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SIRS:

NOTICE IS HEREBY GIVEN that The City of New York, The Board of Inquiry of the Department of Buildings of the City of New York, and Louis Beck hereby appeal to the United States Court of Appeals for the Second Circuit from the order entered herein on November 15, 1974 which ordered that the City of New York produce certain information for discovery and this appeal is taken from each and every part of said order as well as from the whole thereof.



*Notice of Appeal*

Dated: New York, N. Y.  
December 12, 1974

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Attorney for Appellants  
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By: /s/ CARL SANDERS

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*Notice of Appeal*

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(212) 460-6475

**Notice of Motion for Contempt**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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SAME TITLE

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Motion By: Harry H. Lipsig, Esq., Attorney for Plaintiff.

Date, Time and Place of Hearing: January 10, 1975 at  
2:30 P.M., at the United States District Court, Foley  
Square, New York, New York, Room 705.

Supporting Papers: Affidavit of Dennis M. Karsch, duly  
sworn to the 23rd day of December, 1974 and all prior  
pleadings and proceedings heretofore had herein.

Relief Demanded: An order pursuant to Rules 45(f) and  
37(b) finding the City of New York and Louis Beck,  
Esq., in contempt of Court and awarding plaintiff's  
counsel reasonable attorney's fees for the making of  
this motion.

Answering Affidavits: If any are to be served upon the  
undersigned within one (1) day before the return date  
of this motion.

Dated: New York, New York  
December 23, 1974

Yours, etc.,

HARRY H. LIPSIG  
Harry H. Lipsig  
Attorney for Plaintiff  
Office & P.O. Address  
100 Church Street  
New York, New York 10007

*Notice of Motion for Contempt*

To: ADRIAN P. BURKE  
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HART & HUME, Esqs.  
Attorneys for Defendant Roth  
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New York, New York 10016



**Affidavit of Dennis M. Karsch Read in Support of  
Notice of Motion for Contempt**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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[SAME TITLE]

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STATE OF NEW YORK    }  
COUNTY OF NEW YORK } ss.:

DENNIS M. KARSCH, being duly sworn, deposes and says:

I am an attorney associated with the firm of Harry H. Lipsig, attorney for the plaintiff herein and make this motion for an order pursuant to Rules 45(f) and 37(b) of the FRCP requesting the Court to find the City of New York and Louis Beck, general counsel to the Board of Inquiries of the Department of Buildings in contempt of this Court's order entered on the 15th day of November, 1974 and a subpoena served by your deponent's office to produce a completed copy of the Board of Inquiries' report along with any physical evidence and a list of the names and addresses of the witnesses who testified before the Board of Inquiries relating to an explosion at 80 Pine Street, New York, New York on May 3, 1972.

This matter came on before the Court on October 10, 1974. The City of New York moved to quash plaintiff's subpoena upon the grounds of privilege and undue burden. The Court ruled that no privilege existed, however, in the desire to accommodate the attorneys for the City,

*Affidavit of Dennis M. Karsch Read in Support of  
Notice of Motion for Contempt*

the Court referred the question of privilege to Magistrate Martin D. Jacobs. Magistrate Jacobs in reviewing the report recommended that the City be directed to produce the entire report with the exception of its conclusions. The Court incorporated the Magistrate's report in an order entered November 15, 1974, see exhibit "A", and directed the City to produce the aforesaid report in accordance with the Magistrate's recommendations.

Your deponent throughout the entire course of this proceeding has leaned backwards to work out a suitable solution to the problems connected to the production of this report. Indeed, the first time the City's motion was heard, the attorney for the City told us that the City would have no objection to the Magistrate's reviewing the report "in camera" to determine what portions of the report, if any, would be deemed privileged. It is now, however, apparent that the City has had a change of heart and is refusing to turn over this report. In fact, your deponent has been served with a Notice of Appeal from this Court's order, see exhibit "B". It is submitted that this notice on its face is patently defective, as it was not timely made nor was leave granted to appeal but also there has been no stay of this Court's order.

WHEREFORE, it is respectfully requested that this Court grant plaintiff's motion and direct The City of New York and Louis Beck to produce in accordance with the order of November 15, 1974 the aforesaid documents, and further find The City of New York and Louis Beck in contempt and granting plaintiff the reasonable counsel fees for the making of this motion.

DENNIS M. KARSCH

(Sworn to by Dennis M. Karsch on December 23, 1974.)

**Exhibit A Annexed to Affidavit of Dennis M. Karsch,  
Read in Support of Notice of Motion for Contempt,  
Memorandum and Order of Knapp, J.**

(Same as Memorandum and Order of Knapp, J. printed  
herein at page 37, supra.)

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**Exhibit B Annexed to Affidavit of Dennis M. Karsch,  
Read in Support of Notice of Motion for Contempt,  
Notice of Appeal**

(Same as Notice of Appeal printed herein at page  
42a, supra.)

**Cross-Motion for Staying Enforcement of Order of  
Knapp, J., on November 15, 1974**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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[SAME TITLE]

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SIR:

PLEASE TAKE NOTICE that the undersigned will cross move this Court upon argument of the motion for an order holding The City of New York and Louis Beck, Esq., in contempt at a Term Promotions at the United States Courthouse, Room 705, Foley Square, New York, N.Y., on the 10th day of January, 1975 at 2 o'clock in the afternoon or as soon thereafter as Counsel can be heard, for an Order pursuant to Rule 62(c) FRCP staying the enforcement of the order of the Court dated November 15, 1974 pending the final determination of an appeal of the above-mentioned order, which is presently pending in the Court of Appeals for the Second Circuit and for such other and further relief as the Court may deem just and proper.

Dated: New York, N.Y.  
January 8, 1975

Yours, etc.,

ADRIAN P. BURKE  
Corporation Counsel  
Attorney for Defendant  
City of New York  
Office and P.O. Address  
Municipal Building  
New York, N. Y. 10007

By: LOUIS BECK,  
of Counsel



*Cross-Motion for Stay Enforcement of Order of  
Knapp, J., on November 15, 1974*

To:

HARRY H. LIPSIG, Esq.  
Attorney for Plaintiff  
Office and P.O. Address  
100 Church Street  
New York, New York 10007

WILLIAMS & O'NEILL, Esqs.  
Attorneys for Defendant, CON ED.  
130 East 15 Street  
New York, New York 10003

QUIRK & BAKALOR, P.C.  
Attorneys for Defendants  
80 PINE STREET & RUDIN  
444 Madison Avenue  
New York, New York 10022

CRAIG, BETLESKY & LOCKHART, Esqs.  
Attorneys for Defendant, RAISLER  
10 Rockefeller Plaza  
New York, New York 10020

MORRIS, DUFFY, IVONE & JENSEN, Esqs.  
Attorneys for Defendant, STINARD  
233 Broadway  
New York, New York 10007

HANNER, ONERATO & HOGARTY, Esqs.  
Attorneys for Defendant, ADSCO  
1633 Broadway  
New York, New York 10019

HART & HUME, Esqs.  
Attorneys for Defendant, ROTH  
10 East 40 Street  
New York, New York 10016

**Affidavit of Jack Cherrill Read in Support of  
Cross-Motion and in Opposition to Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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SAME TITLE

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STATE OF NEW YORK    }  
COUNTY OF NEW YORK } ss.:

JACK CHERILL, being duly sworn, deposes and says:

I am an Assistant Corporation Counsel of the City of New York and submit this affidavit on behalf of the City of New York and Louis Beck, Esq. in support of the instant cross motion for a stay of an order of this Court pursuant to Rule 62(c) of the FRCP, and in opposition to this instant motion seeking to hold Louis Beck and The City of New York in contempt for its failure to comply with an order of the Court.

Deponents are entitled to a stay of enforcement of the instant order as it is the opinion of this office that the records plaintiff are requesting are privileged and confidential. Should the Court refuse to grant a stay in this matter, and order the City to allow discovery, it will render the instant appeal moot and in fact, be deciding the appeal against your deponents.

It is submitted that as New York law applies in this matter and as privilege and confidentiality is a complete defense to discovery, that your deponents will be success-

*Affidavit of Jack Cherrill Read in Support of  
Cross-Motion and in Opposition to Motion*

ful in this appeal. Additionally a stay of enforcement of this order will not substantially prejudice any party to this action, as the case is not yet ready for trial.

It is further submitted that plaintiff's motion seeking to hold your deponents in contempt is premature as your deponents have not failed to obey an order of this Court. The Court will note that instant order does not require discovery by a date certain. As such, it is the opinion of this office that as this matter is pending in the courts, that your deponents may withhold discovery of the requested documents until there is a final determination by an appeal court on the issues of privilege and confidentiality.

It is further submitted that your deponents have acted in good faith in this matter and in fact communicated with the offices of plaintiff's attorney so that an agreement could have been reached to avoid the necessity of the instant motion and cross-motion. Regretfully plaintiffs attorneys failed to cooperate and as a result this additional litigation is before the Court.

WHEREFORE, it is respectfully requested that the Court grant the instant cross-motion staying the enforcement of the order of this Court dated November 15, 1974 and further that the Court deny the instant motion of plaintiff in its entirety, and further that the Court grant your deponents the costs and disbursements of this motion.

(s) JACK CHERRILL  
Jack Cherrill

(Sworn to by Jack Cherrill on January 9, 1975.)

**Reply Affidavit of Kevin Concagh**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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[SAME TITLE]

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STATE OF NEW YORK        }  
COUNTY OF NEW YORK    } ss.:

KEVIN CONCAGH, being duly sworn, deposes and says:

I am an attorney associated with Harry H. Lipsig, P.C., attorney for the plaintiff herein and submit this affidavit in reply to the affidavit of Jack Cherrill, Esq., sworn to the 9th day of January, 1975.

The relief herein requested should be granted because:

a) The City has openly disobeyed Judge Knapp's Order of October 10th, 1974 directing the production of a special Board of Inquiry Report concerning the 80 Pine Street Explosion.

On October 10th, 1974, Judge Knapp directed that the City produce the Board of Inquiry Report and because of the importance and extent of the file, directed its production take place before a Magistrate of this Court. Accordingly, on the scheduled date, the City, by Paul Aranow, Esq., appeared before Magistrate Jacobs with the special Board of Inquiry Report. Indeed, the various portions of this report were distributed to the many Counsel in attendance. However, during the course of that disclosure, the City reversed its position and at-



*Reply Affidavit of Kevin Concagh*

tempted to argue that various portions of the said report were privileged and should not be subject to disclosure. I was at that hearing and stated that it was the position of the plaintiff's attorney that the question of privilege had been determined by Judge Knapp and the discovery proceeding before Magistrate Jacobs was not intended by Judge Knapp to become an entirely new hearing of the merits of the City's argument that this report was not subject to disclosure.

It was then agreed by the attorney for the City that he would make this record available at the office of the Corporation Counsel within a few days and all that remained to be done was to set up a convenient time. Then one week later, your deponent's office was informed that the City had completely reversed its position and had decided not to honor its agreement to make available this Board of Inquiry Report.

Thereafter, and twenty-seven (27) days after the entry of the order directing this Board of Inquiry Report to be made available, the City filed a Notice of Appeal with the Second Circuit, Court of Appeals.

It is the position of the plaintiff that the Notice of Appeal is a nullity insofar as it purports to appeal an interlocutory order. Thus, the City's failure to produce the Board of Inquiry Report clearly places them in contempt of an order of this Court and the mere fact that a defective Notice of Appeal has been filed, in no way mitigates their contempt.

Your deponent takes strong issue in the suggestion contained in Mr. Cherrill's affidavit that the plaintiff's attorney has not acted in good faith. Indeed, quite the contrary happens to be the case in that the City has re-

*Reply Affidavit of Kevin Concagh*

neged on a promise to produce documents given to the plaintiff's attorney in the presence of a number of other attorneys and now ironically introduces terms like "good faith" in this proceeding.

Any claim of privilege made at this eleventh hour by the City is academic because the City has waived any privilege it may have had when it distributed, for the perusal of all the attorneys present before Magistrate Jacobs, that very Board of Inquiry Report they now claim to be a secret.

It is respectfully submitted that the Court grant the plaintiff's motion and find the respondent in contempt and award Counsel fees and costs for the making of this motion and further direct the respondent, under the penalties of fine and/or imprisonment, to produce the aforesaid documents.

(s) \_\_\_\_\_  
KEVIN CONCAGH

(Sworn to by Kevin Concagh, on January 10, 1975.)

**Order, Knapp, J.**

## UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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[SAME TITLE]

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Plaintiffs having moved this Court for an Order finding the City of New York and Louis Beck, Esq. in contempt of Court and The City of New York and Louis Beck, Esq. having cross-moved for an Order Staying the Enforcement of an Order of this Court dated November 15, 1974, and said motions having come before Magistrate Martin D. Jacobs at 2:30 P.M. in Room 1602 of the United States Courthouse located at Foley Square, New York, New York and the said motion having come onto be heard.

Now, upon reading and filing the Notice of Motion and affidavit of Dennis M. Karsch sworn to on the 23rd day of December, 1974 together with his Memorandum of Law in support of the said motion and the Notice of Cross-Motion and affidavit of Jack Cherrill sworn to on the 8th day of January, 1975 together with his Memorandum of Law in support of the cross-motion, and the plaintiffs having appeared by Kevin Concagh, Esq., and the City of New York and Louis Beck, Esq., having appeared by Adrian P. Burke, Corporation Counsel, Assistant Corporation Counsels Anthony P. Balsamo and Susan Belkin of Counsel and oral argument having been heard, and upon the recommendations of Magistrate Martin D. Jacobs it is hereby

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*Order, Knapp, J.*

Ordered, that plaintiff's motion for contempt is denied and it is further

Ordered, that the cross-motion of the City of New York and Louis Beck, Esq., for a stay pending appeal is granted.

Dated: New York, N. Y.  
January 13, 1975

(s) WHITMAN KNAPP  
U.S.D.J.



**AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL**

State of New York, County of New York, ss.:

CARLOS M. RODRIGUEZ

being duly sworn, says that on the 11 day  
of Feb 19 75, he served the annexed Appendix upon  
Quick & Baklor Esq., the attorney for the Defendants - Appellees  
herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and  
Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the  
United States in said city directed to the said attorney at No. 444 Madison Ave in the  
Borough of MAN, City of New York, being the address within the State theretofore designated by  
him for that purpose.

Sworn to before me, this

11<sup>th</sup> day of February 19 75

John Calia

JOHN CALIA  
Notary Public, State of New York  
No. 41-5573935 Queens County  
Certificate Filed in New York County  
Commission Expires March 30, 1976

Carlos M Rodriguez

Form 323-40M-703823(73) 346

**AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL**

State of New York, County of New York, ss.:

CARLOS M. RODRIGUEZ

being duly sworn, says that on the 11 day  
of Feb 19 75, he served the annexed Appendix upon  
HARRY H. HIPSIG Esq., the attorney for the PLAINTIFF Appellee  
herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and  
Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the  
United States in said city directed to the said attorney at No. 100 Church St in the  
Borough of MAN, City of New York, being the address within the State theretofore designated by  
him for that purpose.

Sworn to before me, this

11<sup>th</sup> day of February 19 75

John Calia

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Notary Public, State of New York  
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State of New York, County of New York, ss.:

CARLOS M. RODRIGUEZ

being duly sworn, says that on the 11 day  
of Feb, 19 75, he served the annexed Appendix upon  
MORRIS, DUFFY, IVONE & JENSEN Esq., the attorney for the Defendants Appellee  
herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and  
Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the  
United States in said city directed to the said attorney at No. 233 13 Way in the  
Borough of MAN, City of New York, being the address within the State theretofore designated by  
him for that purpose.

Sworn to before me, this

11 day of

Feb

19 75

JOHN CALIA

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**AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL**

State of New York, County of New York, ss.:

CARLOS M. RODRIGUEZ

being duly sworn, says that on the 11 day  
of Feb, 19 75, he served the annexed Appendix upon  
HANNER, Onorato & Haggerty & Esq., the attorney for the Def-Appellee Adsc  
herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and  
Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the  
United States in said city directed to the said attorney at No. 1633 13 Way in the  
Borough of MAN, City of New York, being the address within the State theretofore designated by  
him for that purpose.

Sworn to before me, this

11 day of

February

19 75

JOHN CALIA

Notary Public, State of New York  
No. 41-5573935 Queens County  
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Commission Expires March 30, 1976

John Calia

Carlos M Rodriguez

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**AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL**

State of New York, County of New York, ss.:

CARLOS M. RODRIGUEZ being duly sworn, says that on the 11 day of Feb 19 75, he served the annexed Appendix upon Craig & Goen Esq., the attorney for the Deft Appellee Reisler Corporation herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 10 Rockefeller Plaza in the Borough of Man, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

11<sup>th</sup> day of February 19 75  
John Calia

JOHN CALIA  
Notary Public, State of New York  
No. 41-5573935 Queens County  
Certificate Filed in New York County  
Commission Expires March 30, 1976

Carlos M Rodriguez

Form 323-40M-703823(73) 346

**AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL**

State of New York, County of New York, ss.:

~~CARLOS M. RODRIGUEZ~~ being duly sworn, says that on the 11 day of Feb 19 75, he served the annexed Appendix upon Hart & Hume Esq., the attorney for the Defendant-Appellee herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 10 East 40<sup>th</sup> St in the Borough of MAN, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

11<sup>th</sup> day of February 19 75  
John Calia

JOHN CALIA  
Notary Public, State of New York  
No. 41-5573935 Queens County  
Certificate Filed in New York County  
Commission Expires March 30, 1976

Carlos M Rodriguez

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**AFFIDAVIT OF SERVICE**

State of New York, County of New York, ss.:

CARLOS M. RODRIGUEZ

of Feb 19 75, he served to  
WILLIAM E O'NEIL Esq., the a  
herein by depositing a copy of the same, inclosed in a postp  
Centre Streets, in the Borough of Manhattan, City of Ne  
United States in said city directed to the said attorney at l  
Borough of MAN, City of New York, bei  
him for that purpose.

Sworn to before me, this

11th day of February 19 75

John Calia

JOHN CALIA

Notary Public, State of New  
No. 41-5573935 Queens Co  
Certificate Filed in New York  
Commission Expires March 31



ON ATTORNEY BY MAIL

.....being duly sworn, says that on the 11 day  
he annexed Appendix upon  
attorney for the Def-Appellee  
paid wrapper in a post office box situated at Chambers and  
New York, regularly maintained by the government of the  
No. 130 East 15th St in the  
ing the address within the State theretofore designated by

Carlos M Rodriguez

York  
County  
County  
D, 1976